In the Supreme Court of the United States

October Term, 1902

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ELIAS E. BARNES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE DISTRICT OF COLUMBIA, APPELLANT,
v.
ELIAS E. BARNES. } No. 143.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

STATEMENT.

This case was brought in the Court of Claims on August 4, 1880, under the provisions of an act of Congress approved June 16, 1880 (21 Stat., 284), "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes."

On December 10, 1880, a general traverse was filed by the Attorney-General, and on January 26, 1882, a plea of set-off.

On March 31, 1883, by leave of the court, an amended petition was filed (Tr., p. 3). Upon this petition the several trials of this case have been had.

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This action is brought for compensation for work done and materials furnished under two contracts made by the claimant with the District of Columbia. These contracts were numbered, respectively, No. 264 and No. 413 in the series of contracts made by the board of public works of the District of Columbia, which contracts were in writing, duly made and signed, as required by the act of Congress of February 21, 1871, chapter 62, section 37 (16 Stat. L., 427).

Other contracts, which are styled "extensions" of the original contracts, were subsequently entered into, known as the first, second, and third extensions of contract No. 264, and the first, second, third, and fourth extensions of contract No. 413. (Tr. Findings I, VI, pp. 17–21; and Findings X, XI, pp. 24–27.) With these "extensions" we have little to do in this appeal. The accounts about which disputes have arisen grow out of the original contracts. Reference to the extensions is necessary, to show the enlargement of the subjects of the contracts and the differences in the prices agreed to be paid for like kinds of work in the original and the extended contracts. Really, however, the "extensions" were not *extensions* at all, but were new and independent contracts, with no connection with the original contracts, and having no resemblance except that they were made between the same parties.

By section 37 of the act of February 21, 1871 (supra), the board of public works was constituted, and it was provided:

> All contracts made by the said board of public works shall be in writing, and shall be signed

> by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District.

By "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874 (18 Stat. L., 116), the District government, including the board of public works, was abolished, and a government established to be exercised by a Commission, clothed with certain enumerated powers and authorities, and with these limitations (sec. 2):

> But said Commission, in the exercise of such power or authority, shall make no contract nor incur any obligation other than such contracts and obligations as may be necessary to the faithful administration of the valid laws enacted for the government of said District, to the execution of existing legal obligations and contracts, and to the protection or preservation of improvements existing or commenced and not completed at the time of the passage of this act.

In the original contracts the work to be done was described and the prices to be paid therefor specified: as the law required. In all of the "extensions" it was agreed the contractor should receive the prices established and paid by the board of public works for work of similar character. "The board was accustomed to fix prices for different kinds of work by making memoranda upon their records. These rates, which came to be known and familiarly called 'board rates,' to distinguish current and future rates from previous rates, were changed from time to time."

In directing attention to the claims in the petition and in the findings of the court, I shall particularize those only about which disputes have arisen. Reference will be made to the other items to show that where under the so-called "extensions" board rates, different from the rates specified in the original contracts were mentioned these board rates were allowed in every one of the trials of this case.

NORTH CAROLINA AVENUE.

The petition recites that under contract 264 and its extensions, and under orders from defendant's officers in connection therewith, claimant did work on North Carolina avenue. (Tr. Par. 111, p. 4.)

* * * * *

44,975 cubic yards grading (under board of public works), at 30 cents	$13,492.50
44,975 cubic yards hauled 868 feet over 200 feet, at 1¼ cents per yard per 100 feet	4,879.78
44,136.6 cubic yards grading (under Commissioners of the District of Columbia), at 30 cents	13,240.08
44,136.6 cubic yards hauled 1,550 feet over 200 feet, at 1¼ cents per yard per 100 feet	6,549.06
23,704 cubic yards clay excavation, at 30 cents additional	7,111.20

D STREET SE.

The petition further recites, in similar terms, claimant did work on this street. (Par. V, Tr., p. 5.)

* * * * *

3,060 cubic yards grading, at 40 cents per yard	$1,224.00
16,250 cubic yards grading, at 30 cents per yard	4,877.40
17,518 cubic yards haul, 2,400 feet over 200 feet, at 30 cents per yard	5,255.40

2,159 cubic yards grading, at 40 cents per square yard	$863.60
3,841 cubic yards grading, at 30 cents per square yard	1,152.30
6,000 cubic yards haul, 3,014 feet over 200 feet, at 37.68 cents per yard	2,260.80

(Sic.) (The errors in stating haul are apparent.)

THIRD STREET SE., CONTRACT 413.

The petition further recites, in similar terms, claimant did work on this street (Par. VIII, Tr., p. 6): but in it there is no claim for the *disputed* items, which were, however, included in the findings at each trial.

Much testimony was taken, both by depositions and by the presentation and deposit of papers in the custody of the Commissioners of the District of Columbia, applied for by the claimant according to the provisions of section **2** of the jurisdictional act (21 Stat. L., 285), between the filing of the original petition, August 4, 1880, and the allowance of the amended petition, March 31, 1883.

The case was then referred to a referee to take and state an account. Some further testimony was taken and transmitted to the referee, who made his report on May 5, 1885.

Exceptions to this report were filed by both claimant and defendant, and, after some further testimony on the part of claimant, and much delay and elaborate argument the case was finally submitted on March 29, 1887.

On October 31, 1887, the opinion and judgment of the court were announced, and with the findings of

facts filed. The judgment was for *defendants* in the sum of $11,074.11. (Tr., p. 8.)

The case is reported in full in 22 C. Cls. R., 366 *et seq.* The opinion and findings are in a transcript filed by the *District of Columbia, appellant*, v. *Barnes*, No. 400, October term, 1902, of this court (which is the same case as this), the appeal in which case was dismissed (187 U. S., 637). The appellant asks leave to refer to such transcript as a record of this court, and to the case reported in a series which has been repeatedly recognized by this court. It is necessary to advert to these findings, both for comparison and authority, in the consideration of the present appeal. The findings upon the disputed claims in the petition, hereinbefore set out, were as follows (22 C. Cls. R., 376, 378, 379):

(There are some clerical and typographical errors in these tables, but they are apparent, and do not affect the results.)

ON NORTH CAROLINA AVENUE.

13.	63,816 cubic yards excavation, 30	$19,144.80
14.	31,023 cubic yards haul, 1,155 feet over 200 feet, 14.4375 (error) prior to January 1, 1873, at 1 cent per 200 feet	1,791.50
15.	22,945¼ cubic yards haul, 865 feet over 200 feet, 10.85 (error) after January 1, 1873, at 1 cent per 200 feet	995.84
16.	9,848⅝ cubic yards haul, 590 feet over 200 feet, 7.375 (error) after January 1, 1873, 1 cent per 200 feet	290.54

ON D STREET SE.

2.	3,060 yards of grading, done under the original contract not extended, at 30 cents	$918.00
3.	2,159 yards of grading, old gravel street, done under the extension, at 40 cents	863.60
5.	17,518 yards haul, 2,400 feet over 200 feet, done after January 1, 1873, under the original contract not extended, at 1 cent per 200 feet	2,102.16
6.	5,472 yards haul, 2,400 feet over 200 feet, done under second and subsequent extensions of contract, at 1¼ cents per 100 feet	1,641.61

ON THIRD STREET SE.

22.	7,078 cubic yards grading, old gravel street, at 30	2,123.40
23.	29,326.83 cubic yards haul, 1,655 feet over 200 feet, at 1 cent per 200 feet over 200	2,425.38

Comparing the accounts and computations as stated in the petition and in the findings, these facts appear upon the several claims:

THE WORK ON NORTH CAROLINA AVENUE.

First. That all the work was done under contract No. 264.

Second. That the petition claimed for 89,111 cubic yards grading and excavation; the court allowed for only 63,816 cubic yards.

Third. That the petition claimed for all the haul at the rate of 1¼ cents per 100 feet (which was "board rates" after January 1, 1873), while the court allowed only one-half cent per 100 feet (which was the rate in the written contract).

Fourth. That the petition claimed an additional allowance of 30 cents per cubic yard on 23,704 yards

of excavation (grading), while the court disallowed this claim altogether.

THE WORK ON D STREET.

First. That the petition claimed for grading done under the original contract at 40 cents per yard (which was board rates after January 1, 1873), while the court allowed only 30 cents (which was the rate in the written contract).

Second. That the petition claimed for haul under the original contract at 1¼ cents per 100 feet, which was board rate after January 1, 1873, while the court allowed for this haul only 1 cent per 200 feet.

Third. That part of the work was done under the contract 264 and part under the "extensions," and that where the work was done under the "extensions," board rates were allowed.

THE WORK ON THIRD STREET.

First. That the disputed items were for work done under the original contract, and were allowed by the court at the rates stated in the contract.

Second. That, where work was done under the extensions, board rates were allowed.

The judgment of the court of October 31, 1887, was acquiesced in by the defendant; and, through all the perplexed proceedings thereafter, the defendant has persistently urged that those findings and judgment be sustained.

On November 18, 1887, the claimant filed a motion for a new trial.

This motion rested in the records of the court for over seven years and through seven terms of the court before any further attention was called to it.

On March 28, 1895, it was submitted to the court and on April 1, 1895, it was allowed. Such is the record.

But in the meantime the act of February 13, 1895 (28 Stat. L., 664), had been passed, by which the rates established and paid by the board of public works were directed to be allowed to claimant by the Court of Claims, and whenever such rates had not been allowed, the claimant was entitled to a new trial.

At this trial, after a reference and report of a referee, on November 11, 1895, the court adopted the report as its findings, and ordered that judgment be entered as follows:

> That the said Elias E. Barnes do have and recover in the manner provided by the act of June 16, 1880, chapter 243, and under the act of February 13, 1895, the sum of thirty-one thousand seven hundred and fifty-four 57/100 dollars ($31,754.57) upon debts of the District of Columbia, due and payable January 1, 1876, said amount to be divided and paid as follows: To Elias E. Barnes, twenty-two thousand three hundred and fifty 54/100 dollars ($22,350.54), and to Samuel J. Ritchie nine thousand four hundred and four 3/100 dollars ($9,404.03) (Tr., p. 9).

It is indisputable that this new trial was granted under the provisions of the act of 1895; and the findings and judgment of the court were expressly under

that act. The defendant then made a motion for a new trial, which was, on May 18, 1896, allowed. At the next term, on January 6 and 7, 1897, the case was argued and submitted; but before a decision, the act of 1895 was repealed by the act of March 3, 1897 (29 Stat. L., 665, 669). This statute provided that "all proceedings pending shall be vacated and no judgment heretofore rendered in pursuance of said act shall be paid."

The judgment of October 31, 1887, in favor of the District was thus left in force. But, although there is some confusion in the record, the case appears to have been treated as on a new trial allowed under the motion of claimant of November 18, 1887. Defendant is probably precluded from making any exception in this court. On the 19th day of December, 1901, and on the 14th, 15th, and 16th days of January, 1902, the case was again argued and submitted.

On March 31, 1902, the court filed its findings of facts and conclusions of law and entered judgment for the plaintiffs (Tr., pp. 17–38).

In the first finding is set forth contract No. 264, which was (the material part) to grade D street south from Fourth street east to New Jersey avenue, and North Carolina avenue from Fourth street east to New Jersey avenue.

The prices agreed upon are thus set forth in the tenth article of the contract (Tr., p. 19):

> It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials

and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two hundred (200) feet, and one cent additional per cubic yard for every two hundred (200) feet beyond the same.

(*I omit the other terms of the contract as not directly bearing upon the contentions here.*)

In this first finding was also this:

Prior to April 29, 1872, the board of public works of the District of Columbia had, by order entered on their records, fixed the price of certain work. * * *

For grading from and after January 22, 1872, the same prices as in the contract.

For grading old graveled streets to a depth of 2 feet, 40 cents per cubic yard.

And the finding is that the board awarded the contract at such rates and directed their clerk to so prepare it.

And by finding II (Tr., p. 19). That by mistake in the drafting of said contract the rate of 40 cents for grading old graveled streets to a depth of 2 feet was omitted therefrom; that said board of public works and said claimant, by mutual mistake, executed said contract without observing said omission.

Finding IV (Tr., p. 19) is that in September, 1873, the board increased the price for hauling to 1¼ cents

per cubic yard for 100 feet of hauling beyond the first 200 feet, and made said rate applicable to all work done after January 1, 1873.

The fifth finding (Tr., p. 20) is that in 1874 the board established a new grade for North Carolina avenue, and made a verbal agreement with said contractor that he should be paid board rates in certificates of the District for work done to conform to that grade.

In the sixth finding are set out the extensions, made in writing, to contract 264. In these extensions nothing is included of the grading and haul on North Carolina avenue or D street, which were provided for in the original contract. They were for new and different work, in the same localities and upon the same streets, and entered into between the same parties and performed during the progress of the work under 264. They provided that the work should be paid for at board rates and the work done under them was so paid for.

The seventh finding also states a verbal contract by which the claimant was to be paid increased rates over those of the contract.

The eighth finding states, subsequent to the execution of the contract the board had established, by payment to several contractors, the rate of 60 cents per cubic yard for stiff clay excavation.

The ninth finding (Tr., pp. 22, 23, 29) makes the account for the work done upon the disputed items as follows:

ON NORTH CAROLINA AVENUE.

13.	32,793 cubic yards excavation, per measure, August 9, 1872, at 30 cents, to establish grade	$9,837.90
14.	Haul on same, at one-half cent per 100 feet; 1,100 feet at 5½ cents	1,803.61
15.	20,438 cubic yards excavation, per measure, March 27, 1875, at 30 cents, between Coyle grade and new grade	6,131.40
16.	3,854 cubic yards, haul 300 feet, at 1¼ cents per 100 feet at 3¾ cents	144.52
17.	16,584 cubic yards, haul 1,100 feet, at 13¾ cents, at 1¼ cents per 100 feet	2,280.30
18.	10,585.6 cubic yards excavation, per measure, December 2, 1875, at 30 cents per cubic yard	3,175.68
19.	Haul on 10,585.6 cubic yards; 1,550 feet, at .1937 cent, at 1¼ cents per 100 feet	2,050.43
20.	33,550 cubic yards, excavation, per measure, January 22, 1876, at 30 cents per cubic yard, between Coyle grade and new grade	10,065.00
21.	Haul on 33,550 cubic yards, 1,550 feet, at .1937 cent, at 1¼ cents per 100 feet	6,498.63
26.	Additional on clay excavation, 23,704 cubic yards, at 30 cents (done after 1874)	7,111.20
27.	Excavation under sidewalks, viz, 10 inches depth under 4,086.70 square yards, brick pavement, 1,135.19 cubic yards, at 30 cents	340.55

ON D STREET SE.

2.	5,219 cubic yards excavation, at 40 cents, measure of December 14, 1876, between Second and Sixth streets	2,087.60
4.	Haul of 2,238 cubic yards excavation between original surface and established grade, 2,358 feet, at one-half cent per 100 feet, .1179 cent	263.86
5.	Haul of 20,752 cubic yards excavation between established grade and new grade, 2,358 feet, at 1¼ cents per 100 feet, .2947 cent, (as per agreement with the Commissioners)	6,115.61

ON THIRD STREET.

23.	7,078 cubic yards haul, 1,655 feet over 200 feet, at one-half cent, .0827 cent	$585.35
24.	22,248.83 cubic yards haul, 1,655 feet over 200 feet, at 1¼ cent, .2068 cent	4,601.05

These findings differ from the claims of the petition on North Carolina avenue, in that they allow for a much larger amount of excavation and haul than was claimed in the petition.

They differ from the findings in the reported case most materially, in that they allow for a much larger amount of excavation on North Carolina avenue; and for rates for excavation and haul increased over the rates specified in the contracts, as is shown in the comparative tables herein referred to.

Judgment was entered for claimant for $23,694.47, due and payable March 1, 1876. (Tr., p. 38.)

From this judgment an appeal was allowed on June 26, 1902. On December 8, 1902, this appeal was dismissed in the Supreme Court (187 U. S., 638).

The statute, under the provisions of which the court had refused to take jurisdiction of the appeal, having been repealed (31 Stat. L., 572) on October 26, 1903, this present appeal was allowed by the Court of Claims. (Tr., pp. 39, 40.) The repealing statute provided, "from all final judgments or decrees heretofore rendered in suits of the character of those mentioned in said proviso an appeal shall be allowed to the Supreme Court of the United States at any time within ninety days after the passage of this act."

ASSIGNMENT OF ERRORS.

I. The court erred in deciding as a conclusion of law that contract 264 be re-formed so as to incorporate therein the rate of 40 cents per cubic yard for old gravel streets to a depth of 2 feet, to conform to the intention of the parties as set forth in finding 2.

II. The court erred in allowing the item (26) in the account of work on North Carolina avenue (Finding IX, Tr., p. 22) for additional stiff clay excavation, as under a rate established by payment to several contractors, the same being different from the contract rate (Finding VIII); and as being agreed upon by verbal contract (Finding IX).

III. The court erred in holding that the contractor was entitled to recover rates different from and larger than those specified in the written contracts, by reason of memoranda or orders entered on their records by the board of public works. (Findings I, IV, VIII.)

IV. The court erred in holding and deciding that the Commissioners of the District had the authority to make verbal agreements and understandings with the claimant, that he should be paid greater rates for work done under his written contract than those specified in the written contract. (Finding V.)

V. The court erred in allowing, in the several accounts for work done on North Carolina avenue, D street SE., and Third street SE., the items of excavation or grading, at 40 cents per cubic yard, when the contract price was 30 cents per cubic yard. (Contracts, pp. 17 and 24, and accounts Finding IX, Tr., p. 22, and Finding XII, Tr., p. 29.)

VI. The court erred in allowing for excavation or grading on North Carolina avenue a much greater amount than was claimed in the petition in the case. (Finding IX, Tr., p. 22, and petition, Tr., p. 3.)

VII. The court erred in allowing on the several streets 1¼ cents per cubic yard for every 100 feet of excavation hauled beyond the first 200 feet, when the contract price was 1 cent for every 200 feet hauled beyond the first 200 feet. (Contract 264, Finding I; contract 413, Finding X and accounts in Findings IX, Tr., p. 22, and XII, Tr., p. 28.)

VIII. The court erred in re-forming the contracts so as to allow these additional rates.

IX. The court erred in deciding that the contractor was entitled to receive rates greater than those stipulated in the written contracts, by understandings and agreements verbally made by and between the contractor and the Commissioners of the District of Columbia, as stated in Finding V (Tr., p. 20) and Finding VII (Tr., p. 21).

X. The court erred in determining as follows (Tr., p. 37):

"In the present case there does not appear to have been, in terms, a revival of the written contracts, but the verbal agreements on the part of the Commissioners of the District were that for the new or additional work done by the claimant he should be paid the rates therefor established and paid by the board of public works, so that whether the work be regarded as having been done under the contracts as revived or under the verbal agreement of the Commissioners, as set forth in

findings, the claimant, in either event, is entitled, under the provisions of the act of 1880, to the benefit of the rates so established and promised to be paid for the new or additional work performed by him.

XI. The court erred in deciding, as a conclusion of law (Tr., p. 32), that the claimant was entitled to be allowed on findings 9, 12, 13, 14, and 15 the sum of $238,781.94, less the sum of $202,047.68 heretofore paid said claimant, leaving a balance in his favor of $36,734.60.

ARGUMENT.

I.

THE MOTION TO DISMISS THE APPEAL.

This motion is based upon the contention that a so-styled judgment rendered in this case on the 31st day of March, 1902, was a final judgment by which the rights of the claimant became vested, and that a right of appeal subsequently conferred was invalid because destructive of those vested rights.

This contention, when viewed in the light of the circumstances of the litigation of this claim, is not supported by the reasoning or authorities cited in the brief of the appellee.

It is expressly provided in the act of 1880, the act under which this suit was brought, section 1, "the court shall have the same power, proceed in the same manner, and be governed by the same rules in respect to the mode of hearing, adjudication, and determination of said claims as it now has in relation to the adjudication of claims against the United States."

By the second section the right of appeal was assured to both the District of Columbia and the claimant, subject to the same rules and regulations as are prescribed by law for appeals in cases against the United States.

By the third section it is provided that the Attorney-General of the United States shall have authority to defend the District of Columbia against the claims prosecuted in the Court of Claims and on appeal, as in cases against the United States.

This was the law under which this claim was prosecuted until the proviso in the act of June 6, 1900 (31 Stat. L., 572), "no judgment * * * shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by, Congress." On account of this enactment the appeal taken from the "judgment" of the Court of Claims was dismissed. The judgment was rendered afterwards.

But this proviso did not repeal, even by implication, the appellate provisions of the act of 1880. Even if it did, however, there was no solemn judgment of a court which vested rights in the claimant. There was no finality in this action of the court. As was said by Mr. Chief Justice Taney, in the opinion ordered to be embodied in Appendix 117 U. S., 696, "neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place to decide whether he will include it in his estimates of private claims, and if he should decide in

favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment."

And in the case of *District of Columbia* v. *Eslin* (183 U. S., 62, 65), Mr. Justice Harlan, delivering the opinion of the court, said:

> * * * What was said by Chief Justice Taney in *Gordon* v. *United States* (117 U. S., 697, 702), may be here repeated. After stating that this court should not express an opinion where its judgment would not be final and conclusive upon the rights of the parties, and that it was an essential part of every judgment passed by a court exercising judicial power that it should have authority to enforce it, or to give effect to it, the chief justice said: "It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of Congress.

The inevitable conclusion is that this judgment for Barnes was in none of its characteristics a judgment, nor was it similar to the judgments cited by counsel for appellees.

This proviso was repealed by an amendment in the general deficiency bill March 3, 1903 (32 Stat. L., 1070), and the provisions for appeal in the statute of 1880 practically reenacted; "and from all final judgments or decrees heretofore rendered in suits of the character of those mentioned in said proviso an appeal shall be allowed to the Supreme Court of the United States within ninety days after the passage of this act, except in cases where the amounts found due by said court have been paid at the Treasury."

This is the exact language of the clause of the statute repealing the obnoxious provisions of the organic act of 1863. (14 Stat. L., 9.) The second rule of the Supreme Court in reference to appeals from the Court of Claims is, "that in all cases in which judgments or decrees have hertofore been rendered, where either party is by law entitled to an appeal:" following the statute.

This power in Congress over the whole subject-matter of courts and their procedure, in cases against the Government, is complete. There is "no doubt of the power of the legislative body to define the terms on which the judgment may be rendered against the Government as to classes of cases or as to individual cases." (*De Groot* v. *United States*, 5 Wall., 419, 433.)

All this legislation depends upon this power. If this judgment was final, and a contract, and there were vested rights by reason of it, how can the law forbidding its payment, until reported to the Secretary and specific authority for its payment granted by Con-

gress, be sustained? Manifestly this was a thing *in fieri*, an expression, an opinion of a commission—a board of examination. If the repeal of the proviso gave it the form and substance of a judgment of a court, then it had no vigor of execution until the exhaustion or destruction of the right of appeal. There is no uncertainty as to the intention of Congress in these several enactments. The effect of the proviso of 1900 was to put the action of the Court of Claims in these cases upon the same plane as cases referred to them under the Bowman and Tucker acts, where they transmit their findings to Congress. The circumstance that the court calls its decisions judgments, as Mr. Chief Justice Taney said in *Gordon* v. *United States* (*supra*), can not alter its character nor enlarge its power.

How then can this enactment be brought within any objections to retrospective enactments? Was any right of this claimant injuriously affected by this remedial legislation, for such it was? Rather, under the whole theory of the organization of the Court of Claims, was he not in a better position, by reason of this later statute, to establish honest and substantial obligations? And, after all, is not that one of the surest tests of the validity of retrospective laws?

To shorten this brief, I ask leave to refer the court, in addition to what I have said here, to the brief heretofore filed in opposition to the motion to dismiss.

II.

NO GENERAL EQUITY JURISDICITON WAS CONFERRED UPON THE COURT OF CLAIMS BY THE ORIGINAL ORGANIC ACTS.

The Court of Claims owes its establishment, primarily, to the accumulation of large numbers of private claims against the Government presented to Congress. "It was established," says Mr. Chief Justice Chase, in *Klein's case* (13 Wall., 128), "for the triple purpose of relieving Congress, and of protecting the Government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims."

It is one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the Government and the citizen. "If, therefore, the Court of Claims has the right to entertain jurisdiction of cases in which the United States is defendant, and to render judgment against that defendant, it is only by virtue of acts of Congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to parties and to the cause of action, as Congress has prescribed." (*De Groot* v. *United States*, 5 Wall., 419, 431.)

The creative act was passed February 24, 1855 (10 Stat. at L., 612). By it a court was established with authority "to hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States which may be suggested to it by a petition filed

therein; and also all claims which may be referred to it by either House of Congress."

It was enacted, section 7, that at stated times the court should report to Congress the cases upon which they had finally acted, stating the material facts, with their opinion, etc., for the action of Congress.

The uncertainties and judicial embarrassments, attendant upon this mode of procedure, caused the act of 1863 (12 Stat. at L., 765), which conferred, generally, the same jurisdiction, but also jurisdiction (sec. 2) of "all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatever on the part of the Government against any person making claims against the Government in said court."

It has been uniformly decided in this court that the causes of action under these statutes are claims for the satisfaction of which a money judgment may be given. The question was directly presented in *United States* v. *Alire* (6 Wall., 573). The petitioner brought suit in the Court of Claims, praying that a bounty land warrant be made and delivered to him.

Mr. Justice Nelson, delivering the opinion of the court, said:

> It will be seen by reference to the two acts of Congress on this subject, that the only judgments which the Court of Claims are authorized to render against the Government, or over which the Supreme Court have any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is

made, are judgments for money found due from the Government to the petitioner. And although it is true that the subject-matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the Government.

* * * * *

Even if the first section of the act of 1855 and the second of 1863 could be construed as giving a jurisdiction in cases other than money demands against the Government, no judgment could be rendered by the court below, and, of consequence, the carrying into effect their finding must depend on the act of 1855. But we are of opinion that it was intended by the several provisions of the act of 1863 that the cases to be heard were to pass into a judgment as prescribed in the seventh section of the latter act, and hence they must be such in their nature and character as may admit of a judgment or decree in conformity with its provisions.

In *Case* v. *Terrell* (11 Wall., 199, 201) Mr. Justice Miller speaks of "moneyed judgments" as being peculiarly the subject of this jurisdiction.

In *Bonner* v. *United States* (9 Wall., 156), which was a suit for compensation for lands ceded for claimant's benefit by virtue of his holding a military land warrant, on the allegation that the Government had wrongfully

appropriated to other uses the lands, the court uses the following language:

> If this position (the claimant's) be correct, this claim is based on the theory that the United States has violated the trust contained in the deed of cession of the Northwestern Territory, and is bound in good conscience to furnish compensation to the Virginia beneficiaries who suffer by this misconduct. This makes a case for the interposition of a court of equity, and if it were a controversy between two private suitors, it would have to be settled there, for a court of law could not afford the proper mode and measure of relief. But the Court of Claims has no equitable jurisdiction given it, and was not created to inquire into rights in equity set up by claimants against the United States. Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them.
>
> * * * * *
>
> It is only a contract authorized by law that the Court of Claims can consider, and as there is no law of Congress on this subject there is nothing on which that court could base a judgment against the United States if, in the opinion of that tribunal, it had not fulfilled its duties toward the beneficiaries under the Virginia deed of cession. The liability of the Government, if at all, arises out of the breach of an accepted trust, and that liability can not be enforced at law. The claimant is in no better position because the Government is the trustee than he would be if a private person occupied

> that relation, and it is very clear, if such were the case, that a court of equity would alone have the power to deal with him.

For the same reason the jurisdiction did not extend to claims in admiralty, or for the enforcement of liens, which are generally prosecuted by proceedings *in rem*.

III.

NEITHER WAS GENERAL EQUITY JURISDICTION CONFERRED BY THE ACT OF MARCH 3, 1887 (24 STAT. AT L. 505).

By the first section of this act it is provided:

> That the Court of Claims shall have jurisdiction of all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable.
>
> * * * * *
>
> All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court.

The second section provides for the concurrent jurisdiction, limited as to amount claimed, in the district and circuit courts.

The fifth section prescribes the mode of procedure. It requires the petitioner to set forth "the nature of his claim" and the facts "upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and the law."

The language "the money or other thing claimed" in this section does not imply that the suit may be for a thing, but against it. As the jurisdiction was extended to equitable and admiralty claims by the first section, and as in equity or admiralty the claim might be of such a character that it could be enforced only by a suit against the thing, which would be the thing claimed, it was necessary in the procedure to use that word as well as the words *money* and *damages*. In admiralty, the property of the United States might be subject to a lien for salvage, or other maritime lien. Proceedings to enforce such a lien would be *in rem*, and in such cases the right would exist notwithstanding the ownership of the thing by the United States. But there was no remedy to enforce it, because of the exemption of the Government from suit. In *Briggs* v. *Boats* (11 Allen, 157) it was ruled that the right existed, but that there was no remedy after the boats had passed into the ownership and possession of the Government.

Or possibly, a view might be taken that if the United States should purchase a piece of land, against which a mortgage lien existed prior to the purchase, a bill in

equity might be filed to foreclose. But even then the decree could only be for the money claimed.

But, conceding for the purposes of the argument, that the words *anything claimed* were necessary to include all the claims embraced in the first section of this act, that does not support the inference that all equitable and maritime powers were intended to be embraced in the jurisdiction. Mr. Justice Bradley, in speaking of this very clause, in a case we will hereafter advert to, said: "It is one of those general expressions which must be restrained by the more special and definite indications of intention furnished by the context." (*United States* v. *Carrie Jones*, 131 U. S., 1, 19.)

The tenth section provides that no appeal or writ of error shall be allowed after six months from the judgment or decree; and that from the date of the final judgment or decree, interest shall be computed thereon at the rate of 4 per cent per annum, until the time when an appropriation is made for the payment of the judgment or decree. This shows that whatever was the judgment or decree it was to be satisfied by payment of money, and that interest was to be collected on the amount. The judgments or decrees must be for money in all cases. This excludes the idea of general jurisdiction.

Besides, if Congress had intended to confer this jurisdiction on the Court of Claims in all matters in dispute in which the United States was a party in interest it would have said so, as has been said in other jurisdictional legislation, as:

> The circuit courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature, at common law or equity, where the *matter in dispute*, exclusive of costs, exceeds the sum or value of five hundred dollars.
>
> Second. Of all suits in equity where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners. (Rev. Stat., sec. 629.)

IV.

NOR WAS ANY GENERAL EQUITY JURISDICTION CONFERRED UPON THE COURT OF CLAIMS BY THE ACT OF MARCH 3, 1880 (21 STAT. AT L., 284), EXTENDING JURISDICTION TO CLAIMS AGAINST THE DISTRICT OF COLUMBIA.

By the first section of this act it is provided:

> That the jurisdiction of the Court of Claims is hereby extended to, and it shall have original legal and equitable jurisdiction of, all claims now existing against the District of Columbia arising out of contracts, made by the late board of public works and extensions thereof made by the Commissioners of the District of Columbia. * * *

By a mere cursory reading of this act it is manifest the intention of Congress was to assimilate it with the statutes of the original jurisdiction of the court in suits wherein the United States was a party in interest. In truth, in all the jurisdictional statutes, the well-considered design was kept in view to bring into conformity

the jurisdiction and procedure of the court, whatever might be the subject-matter upon which it was exercised.

To be sure, the act of 1887, which we have been considering, was passed long subsequent to the act of 1880, under which the present suit is brought. What I propose to show is that all these statutes are identical in their incidents and characteristics. And if we were to omit from the comparison the act of 1887, still the acts of 1855 and 1863 would remain as trail markers for all following legislation.

The words "legal and equitable jurisdiction" in the first section appear to be regarded by the Court of Claims as conferring general equity jurisdiction. It is insisted by the appellant that the context precludes any such conclusion. If, as I have said before, Congress had intended this broad jurisdiction in equity, it would have used the language it always used in conferring such jurisdiction. The word *equitable* has here its ordinary signification—"marked by a due consideration of what is fair, unbiased, and impartial." It is not to be understood as referred to the technical definition of the powers of a court of chancery. We find many such uses of this and similar words. They may not be the words of designation of equity jurisdiction, when that jurisdiction is being conferred. Other appropriate and accustomed words are used for that purpose.

Now, there have been cases which, by the language of the acts, were to be conducted according to the rules of equity. Such are the familiar cases brought

under the statutes providing for the settlement and confirmation of private land titles in Florida, etc. By these rules were meant the well-settled usages and principles of the court of chancery as adopted and recognized in their decisions, which have been acted on here, under the provisions of the Constitution and the acts of Congress. (*United States* v. *Arredondo*, 6 Pet., 691, 709.)

Thus also in cases like *United States* v. *Lyndes' Heirs* (11 Wall., 632), which was the question of the confirmation of a title by grant, *according to the principles of equity and justice*, it was said that the probable meaning was that *if it should appear* that a grant was obtained by fraud, or was affected by any other special vice, it would be the duty of the tribunals to reject it. How different the requirement of these statutes! How definite the mandate to the officers or court!

Restraining this general term, in the light of the context of this and similar statutes of jurisdictional legislation, enough efficacy can be given the language by a no means strained construction. It is not uncommon for legislators, out of caution, to embrace in a statute a sort of amplifying words, but which are intended merely to invoke or warrant a liberal construction. The word we are speaking of receives a fair meaning if we apply this test. And more strongly still, if we refer to the third section: "The Attorney-General of the United States shall * * * defend * * * with the same power to interpose counterclaims and offsets against claims and defenses for fraud practiced

or attempted as in claims against the United States." These were matters originally of equitable jurisdiction, and so were other matters of defense mentioned.

As, in *Gaines* v. *Miller* (111 U. S., 395), a demurrer to a bill in equity was sustained, the court deciding that the action was simply a case of money had and received for the use of the complainant, and a declaration in assumpsit in the common counts would have fully stated the complainant's cause of action.

In *Wallis* v. *Shelly* (30 Fed. R.) the court said: "Although an action for money had and received is frequently called an 'equitable action' by the authorities, courts of equity refuse jurisdiction, in the absence of special circumstances, because the remedy at law is adequate and complete." And yet these cases, originally, were cases upon *equitable considerations.*

Moreover, this "equitable" jurisdiction is confined to *claims* in this statute as well as the other statutes of jurisdiction in the Court of Claims, or courts having concurrent jurisdiction.

The extended jurisdiction conferred by the act of 1887 is broader than that in the District of Columbia act. The language is "in respect of which claim the party will be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."

In the case of *United States* v. *Carrie Jones* (131 U. S., 1) Mr. Justice Bradley, in delivering the opinion of the court, speaking of this latter act, said:

> "Claims" redressible "in a court of law," equity, or admiralty, may be claims for money

only, or they may be claims for property or specific relief, according as the context of the statute may require or allow. The claims referred to in the original statute of 1855, as described in the first section thereof, above quoted, might have included claims for other things besides money; but various provisions of that act and of the act of March 3, 1863, were inconsistent with the enforcement of any claims under the law except claims for money. Thus in the fifth section of the act of 1863 the right of appeal was limited to cases in which the amount in controversy exceeded $3,000, and in the seventh section it was provided that if judgment should be given in favor of the claimant the *sum* due thereby should be paid out of any general appropriation made by law for the payment of private claims; and if a judgment was affirmed on appeal interest was to be allowed thereon, etc. * * *

The sections of the act of 1863 referred to in this opinion are still in force, not being repealed by the act of 1887, which only repeals "all laws and parts of laws inconsistent" therewith. Section 5, relating to appeals, is transferred to section 707 of the Revised Statutes, giving an appeal to this court "where the amount in controversy exceeds $3,000;" and section 7, relating to the mode of paying judgments out of a general appropriation, and allowing interest where a judgment is affirmed, is contained in sections 1089, 1090 of the Revised Statutes. These sections are still the law on the subjects to which they relate, being necessary to the completion of the

system, and not being supplied by any other enactments. Indeed, they are expressly retained. The fourth section of the act of 1887 declares: "The jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act," and the ninth section declares "that the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained." These provisions undoubtedly include the Court of Claims as well as the district and circuit courts. So, in relation to interest, section 10 declares that "from the date of such final judgment or decree interest shall be computed thereon, at the rate of four per cent per annum, until the time when an appropriation is made for the payment of the judgment or decree." It seems, therefore, that in the point of providing only for money decrees and money judgments the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands. We do not think that it was the intention of Congress to go further than this. Had it been, some provision would have been made for carrying into execution decrees for specific performance, or for delivering the possession of property recovered in kind. The

> general scope and purport of the act is against any further extension than that here indicated. The expression in the fifth section referring to "money or any other thing claimed, or damages sought to be recovered," on which so much reliance is placed by the appellees, can not outweigh the considerations referred to, and operate to introduce entirely new fields of jurisdiction. * * *

All through this discussion it is to be borne in mind that the claims against the District of Columbia are, as well, claims against the United States, because the indebtednesses out of which they arose were indebtednesses, a moiety against each. (18 Stat. L., 120; Ib., 332; 19 Ib., 211; 20 Ib., 102, 104, 105; *District of Columbia* v. *Johnson*, 165 U. S., 330, 332.)

The modes of procedure in all these acts were substantially the same; and the character of the jurisdiction applies with similar force to all.

We have referred to the acts of 1863 and 1887. Let us notice the resemblances in the act of 1880.

By the first section of that act (*supra*) said Court of Claims shall have the same power, proceed in the same manner, and be governed by the same rules, in respect to the mode of hearing, adjudication, and determination of said claims, as it now has in relation to the adjudication of claims against the United States.

By the second section: All such claims against the District of Columbia shall, in the first instance, be prosecuted before the Court of Claims by the claimant, his personal representative, or his assignee, in the same manner, and subject to the same rules, so far as

applicable, as claims against the United States are prosecuted therein.

By section 3, the Attorney-General of the United States shall have authority, and it shall be his duty, to defend the District of Columbia against all such claims against the District of Columbia, prosecuted in said Court of Claims, and on appeal in like manner as he is now by law required to defend the United States in said court, with the same power to interpose counter claims and offsets against said claim, and defenses for fraud practiced or attempted, and all other legal defenses, and with like power of appeal, as in cases against the United States tried in said court.

By section 4, all laws now in force relating to prosecutions of claims against the United States in the Court of Claims shall apply, as far as applicable, to the prosecution, practice, hearing, and determination of claims against the District of Columbia, authorized to be prosecuted under the provisions of this act.

By section 5 it is provided that the sums due in cases of final judgment shall be paid by the Secretary of the Treasury, which payment, by section 6, is made in the 3–65 bonds authorized by the act of Congress of June 20, 1874.

It seems clear that the reasoning of the cases construing the acts of 1863 and 1887 applies with equal force to the construction of the act of 1880. Indeed, the construction of the latter act is circumscribed by narrower bounds, in that the claims to be adjudicated are of a limited class and regulated by well-defined principles of statutory law

V.

AND, IF ANY EQUITY JURISDICTION WAS CONFERRED UPON THE COURT OF CLAIMS, UNDER THE STATUTE OF MARCH 3, 1880, THAT JURISDICTION CAN BE EXERCISED ONLY IN THE MANNER PRESCRIBED FOR ASCERTAINING EQUITABLE RIGHTS AND ADMINISTERING EQUITABLE REMEDIES IN THE COURTS OF THE UNITED STATES.

The granted jurisdiction is *original* equitable jurisdiction: jurisdiction in the first instance. If the claim which a party has is redressible only in a court of equity he must proceed by bill in equity. And in any court of the United States, even if the subject-matter is auxiliary or assisting, the redress can not be afforded in a suit at law if that subject-matter is the object of equity jurisdiction.

This distinction between common law and equity jurisdiction was carefully discussed by Mr. Justice Daniel in delivering the opinion in *Fenn* v. *Holme* (21 How., 481, 484, 485, 486). That learned justice said:

> In the act of Congress "to establish the judicial courts of the United States" this distribution of law and equity powers is frequently referred to, and by the sixteenth section of that act, as if to place the distinction between those powers beyond misapprehension, it is provided "that suits in equity shall not be maintained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," at the same time affirming and separating the two classes or sources of

judicial authority. In every instance in which this court has expounded the phrases proceedings at the common law and proceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal, and the latter as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the court of chancery in England.

* * * * *

In the case of *Parsons* v. *Bedford et al.* (3 Peters, 446, 447), this court, in speaking of the seventh amendment of the Constitution, and of the state of public sentiment which demanded and produced that amendment, say:

"The Constitution had declared, in the third article, that the judicial power shall extend to all cases *in law and equity* arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, etc. It is well known that in civil suits, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that the distinction was present in the minds of the framers of the amendment. By *common law* they meant what

the Constitution denominated in the third article LAW; not merely *suits* which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where *equitable rights* alone were recognized and equitable remedies administered."

The same doctrine is recognized in the case of *Strother* v. *Lucas* (6 Peters, 768, 769), and in the case of *Parish* v. *Ellis* (16 Peters, 453, 454).

In *Bennett* v. *Butterworth* (11 How., 669, 674, 675) this court said:

"The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity, and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But if the claim be an equitable one, he must proceed according to the rules which this court has prescribed, regulating proceedings in equity in the courts of the United States."

And in *Krippendorf* v. *Hyde* (110 U. S., 276, 284), this court, by Mr. Justice Matthews, said:

This court has uniformly resisted the tendency to confuse the boundaries of law and equity in its procedure, and maintained the distinction between the two systems, so deeply imbedded in our jurisprudence; and in the present instance is not to be considered as departing from the consistent course of precedents in which that distinction has been main-

> tained. The bill in this case is not to be treated as an original bill in equity, for as such it could not be maintained.

Van Norden v. *Morton* (99 U. S., 378) was a bill in equity in the United States circuit court for the district of Louisiana, where a marshal had seized a dredge boat under an execution, and the complainant alleged that he was the owner of the boat, that it was not liable to be taken on execution, that the seizure had subjected him to loss, and the continued deprivation of its use would cause him much greater loss. A temporary injunction was granted, and on hearing the bill was dismissed on its merits. On appeal the bill was ordered dismissed for want of jurisdiction. In delivering the opinion of the court, Mr. Justice Miller said:

> We think the rule is settled in this cause that whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent upon State statutes or acts of Congress, the jurisdiction of such cases as between the law side and the equity side of a Federal court must be determined by the essential character of the case, and unless it comes within some of the recognized heads of equitable jurisdiction it must be held to belong to the other.

The learned judge then refers to *Thompson* v. *Railroad Co.* (6 Wall., 134), in which this court said:

> The remedies in the courts of the United States are at common law or in equity, not according to the practice of the State courts, but according to the principles of common law and

> equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And, although the forms of proceedings and practice in the State courts shall have been adopted in the circuit courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit, citing *Robinson* v. *Campbell* (3 Wheat., 212); and *Bennett* v. *Butterworth* (11 How., 669), to which we take leave to add *Jones et al.* v. *McMasters* (20 Id., 8), and *Basey* v. *Gallagher* (20 Wall., 680).

Most of the errors assigned in this case go to the reformation of contracts 264 and 413, so as to allow increased rates for excavation and haul for work done on the different streets.

The first conclusion of law (Tr., p. 32) decides that contract 264 be *reformed* by incorporating a rate of 40 cents per cubic yard for old gravelled streets, and this rate is carried into the account allowed on D street. (Tr., p. 23.)

Other changes in the contracts amount to reformations, and are referred to in detail in my statement.

The reformation of written contracts is peculiarly a ground of equitable jurisdiction. That this power exists is too well settled to be disputed; but it is a power in courts of equity alone. Mr. Justice Story, in his work on Equity Jurisprudence, says, section 164*d*:

> The court will not re-form a deed on petition

> or motion, but only upon regular bill for that purpose, wherein the proposed alteration is distinctly set forth; and until the deed is re-formed the court is bound to act upon it as it exists, although fully satisfied that it is at variance with the intention of the parties.

In *Walden* v. *Skinner* (101 U. S., 577, 583), this court, speaking by Mr. Justice Clifford, states the rule:

> Courts of equity afford relief in case of mistake of facts, and allow parol evidence to vary and re-form written contracts and instruments, when the defect or error arises from accident or misconception, as properly forming an exception to the general rule which excludes parol testimony offered to vary or contradict written instruments.

In *Union Mutual Life Ins. Co.* v. *Mowry* (96 U. S., 544), Mr. Justice Field, delivering the opinion of the court, said:

> If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and the insurance company.

These authorities apply, peculiarly, to the first error assigned. But they are also of force in considering the second, fifth, seventh, and eighth assignments of error, directed to the action of the court below in

reforming the contract in the matter of the "stiff clay" excavation, and in reforming the contract so as to incorporate in it after established rates of haul.

The contract No. 264 was "to grade North Carolina avenue from Fourth street east to New Jersey avenue." By the fourth paragraph of the contract it was agreed that the party of the first part may, on notice to the party of the second part, suspend work under this contract. By the sixth paragraph it was agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same * * * shall be sustained by the contractor. And in the tenth article it was agreed that the contractor should receive the prices mentioned as full compensation for furnishing all the materials and labor which might be required in the prosecution of the whole of the work to be done under the agreement. "Stiff clay" excavation is not mentioned, but excavation of "earth, sand, or gravel."

In Finding IX is stated, "under said contract No. 264 and the extensions thereof, as reformed by the insertion of the omitted rate for old gravel streets and the additional for clay excavation * * *." It is true that the learned judge who delivered the opinion of the Court of Claims speaks also of this work having been done by verbal agreement with the Commissioners. But the pleadings in the case allege, and all the accounts from the very beginning show and claim, that this work was done under contract 264. I allude to it

at this time under this claim for reformation of the contract. And so, also, of the claim for the additional amount of haul. If the work was done under the contracts, as is stated in the petition and findings, the parties are bound and limited to the prices in the written contract. If the understanding, before the contract was executed, was that the parties were to receive prices as arranged and established by the board of public works during the continuance of the work, and it was sought to reform the contract to show this mistake, this could only be done in the manner indicated by the authorities above cited.

VI.

THERE WAS NO AUTHORITY IN THE BOARD OF PUBLIC WORKS OR THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA, BY MEMORANDA ON THEIR JOURNALS OR BY VERBAL AGREEMENTS, TO CHANGE THE CONTRACTS MADE UNDER EXISTING LAW.

These contracts were entered into under the act of February 21, 1871 (16 Stat. L., 427), which, as we have seen, required all contracts to be in writing and forbade the allowance of extra compensation for work done under a contract.

The errors assigned by appellant are directed toward the allowance by the court below of items in the several accounts which were not embraced in the written contracts.

These items had been rejected by the court at a previous trial of the case. That matter is thus alluded

to by the learned judge delivering the opinion in the case under review:

> We have thus stated the differences between the findings heretofore filed and the findings now filed.

It is for this reason that, with great respect, I urge upon this court that the former findings and judgment of the court were correct.

1. As to the increased amount of excavation on North Carolina avenue, the findings are for 97,336.6 cubic yards. The finding of the court before was for 63,816 cubic yards. I do not claim to go behind this finding of facts, but, as the petition only claims 89,112 cubic yards, I submit the claimant can not recover a greater amount than thus claimed.

2. As to the increased price for excavating graveled streets, in the opinion at the former trial, Mr. Chief Justice Richardson said (22 Ct. Cls. R., 389):

> It appears that on September 14, 1871, the board, by a memorandum on their records, fixed the price of grading at 20 cents per cubic yard, and twelve days later—September 26—probably before any contracts were signed, they resolved that the price did not apply to old graveled streets ordered to be cut down, but that they would allow 40 cents for such grading and "that the chief of the bureau of contracts be notified of this action." It is to be presumed that the contract clerk thereafter, as was his duty, made out all contracts according to that resolution until January 22, 1872, when the board entered of record another order.

They then ordered "that the prices of grading be fixed from and after this date at 30 cents per cubic yard," thus taking a mean between the two former prices of 20 and 40 cents, and fixing one uniform rate for all grading at 30 cents per cubic yard.

The claimant's two contracts were made subsequently to the latter date, in the months of April and July then next following, and they conform, as to the price of grading, to the then most recent order of 30 cents per cubic yard. Had any different rate for different kinds of grading been intended they should have, and no doubt would have, been set out in the formal written contracts, since those contracts specified exactly what streets were to be graded at 30 cents per cubic yard, and both parties knew whether any portion of them were old graveled streets or not, and yet made no exception.

In our opinion, the claimant is bound by his contracts at 30 cents per cubic yard for all grading which he did under them, and can not hold the District to pay 40 cents a cubic yard under a preexisting order of the board of public works not reduced to writing and signed by the parties according to law.

3. As to the "stiff-clay" excavation.

This item (26 Finding IX; Tr., p. 22) $7,111.20 was an additional 30 cents over the price of 30 cents allowed in the contract. At the former trial the judge delivering the opinion of the court said in reference to this claim (22 Ct. Cls. R., 389, 340):

There is still another claim for the excavation of "stiff clay," which occurred on North Carolina

avenue. By his contract, No. 264, said Barnes agreed to grade that street, and the only compensation agreed upon was "30 cents for each and every cubic yard of earth, sand, or gravel excavated." Under that agreement he excavated 63,816 yards, of which about one-third was "stiff clay."

Whether or not "stiff clay" properly comes within the terms "earth, sand, or gravel," in all connections, we think the contractor is not entitled to extra pay for excavating it in this case. The grading of a particular street was the work contracted for, and not the removal of "earth, sand, and gravel," and the clay found in the material excavated was incidental to the work, and intended, as it seems to us, to be covered by the price agreed upon per yard. The contractor excavated the whole under his contract without objecting and without notice to the other party that he claimed that any of the work was not embraced in his contract price, and that he should demand extra pay for "stiff clay," until the whole was completed. This, we think, was an acquiescence in the construction that the contract price per yard covered the whole work, as claimed by the defendant and their officers.

This was exactly the case in *Barnard, Admr.*, v. *District of Columbia* (20 C. Cls. R., 257). The contract with Barnard's intestate included the "30 cents per cubic yard for grading." The board, just before making the contract, had entered on its journal: "Chief engineer was notified that the following price was estab-

lished for rock excavation, viz: Cutting down streets and the like, $1. Auditor and contract clerk notified."

Claimant urged he was entitled to this $1 per cubic yard for rock excavation. The claim was disallowed on the ground that the excavation was included in "earth, stone, or gravel." On appeal to the Supreme Court, this position was affirmed. (*Barnard* v. *District of Columbia*, 127 U. S., 409.)

4. As to rates for haul increased over contract rates.

The increased rates were claimed in the petition and are allowed by the court here. They were disallowed by the court at the first trial, and the reasons given. (22 C. Cls. R., 384.)

> On the 15th of July, 1873, the board entered upon its records and notified the contract clerk and auditor "that the price for hauling earth had been established at 1¼ cents per cubic yard for every 100 feet of haul over the first 200 feet *since June* 1, 1873," and on the 27th of September, 1873, "that in settlements of accounts for extra haul 1¼ cents per cubic yard for each additional 100 feet beyond the first 200 feet for all work done *since January* 1, 1873, be allowed." (Finding II.) As a direction to subordinate officers in the drawing and settling of *future contracts* this was within their authority, but existing contracts could not be thus altered so as to bind the District to new and greater obligations. Such attempted alterations would constitute new contracts, required, as we have seen, to be in writing and signed by the parties. Yet the claimant demands the increased rates for all work done *after January* 1, 1873, under

his then existing written contracts entered into a year or more previously to these memoranda.

* * * * *

Nor was the fact that the board had in a few instances granted the new prices for old work under old contracts any consideration for payment in like manner on all outstanding written contracts. In reality this increase as to preexisting contracts was nothing more nor less than a gratuity which the board directed the auditor to allow to contractors, and which they had no authority to grant from public funds. These memoranda were not signed by anybody as contracts were by law required to be signed, were unilateral, and not addressed to claimant, and he was not privy to them. They undertook to give additional compensation to contractors at 150 per cent above their written contract agreements, making every $100,000 of work at contract price cost the District $250,000

It was to prevent such proceedings as this by authority of sanction of the legislature that Congress, in the statute organizing the District government and the board of public works, enacted the following section:

"SEC. 16. The legislative assembly shall never grant or authorize extra compensation, fee, or allowance to any public officer, agent, servant, *or contractor*, after such service has been rendered *or a contract made*, nor authorize the payment of any claim or part thereof hereafter created against the District under any contract or agreement made, without express authority

of law; *and all such unauthorized agreements or contracts shall be null and void.* (Act of February 21, 1871, ch. 62, sec. 15; 16 Stat. L., 423.)"

It was the consummation of just such pernicious and illegal practices by the board of public works that contributed to swell the debt of the District of Columbia to more than $20,000,000. The gratuitous distribution of public money, under whatever pretense, was not within the legitimate and legal powers of the board of public works.

* * * * *

The questions, then, are: Can this court enforce claims founded upon these memoranda of the board of public works? Could the board of audit rightfully allow any such claims? Could the board of public works legally pay them?

In the numerous cases which have been before us under the District claims act we have uniformly and unanimously held otherwise; and now, after having completed nearly all the business under that act we see no reason for changing our rulings. (*Roche's case*, 18 C. Cls. R., 227; *O'Hare's case*, 18 C. Cls. R., 646; *Campbell and Eslin*, 18 C. Cls. R., 193; *Little's case*, 19 C. Cls. R., 327; *Barnard's case*, 20 C. Cls. R., 257; *Sanders' case*, 20 C. Cls. R., 337; *Betts' case*, 20 C. Cls. R., 445.)

We have seen that the items of dispute in the case at bar were settled in favor of the appellant by reference to certain conclusions of law. We have seen that these principles of law were considered, main-

tained, and applied in a long line of kindred cases in the Court of Claims. In the case of *Eslin* v. *District of Columbia* (22 C. Cls. R.), a case decided on the same day, the case of Barnes was fully approved. In *Barnard* v. *District of Columbia* (supra) this court, by Judge Field, said:

> The act of Congress of February 21, 1871, "to provide a government for the District of Columbia," in force at the time, required that all contracts by the board should be in writing, be signed by the parties making the same, and a copy thereof filed in the office of the secretary of the District, and it forbade the allowance of any extra compensation for work done under a contract. (16 Stat. L., 419, 423, ch. 62, secs. 15, 37.)
>
> The entry in the journal of the board was no part of the contract with the claimant, nor could it in any respect control the construction or limit the effect of such contract. The board could not in that way either make a new contract or alter the one previously made so as to bind the District. (*Barnes* v. *District of Columbia*, 22 C. Cls., R. 366.)

The correctness of this judgment upon these matters outside the contract appears to have been recognized and acquiesced in by the appellee. Nothing further was done by him until after the passage of the act of February 13, 1895 (*supra*), which provided that in the adjudication of claims brought under the act of 1880 the Court of Claims shall allow the rates established and paid by the board of public works, and whenever

said rates have not been allowed the claimant or his personal representatives shall be entitled to a new trial of his case. Under this act the petitioner came in and asked the court for a judgment upon these disallowed items seven years after it had been decided he was not entitled to them. His case was heard and a judgment rendered in his favor for $31,754.57 (which is almost identical, with one exception, with the judgment now appealed from) "under the act of February 13, 1895." (Tr., p. 9.) Of course in this judgment all counterclaims were excluded, because the counterclaims were based upon unauthorized board rates. The exception arises from the increased amount of excavation on North Carolina avenue and makes the judgment, exclusive of some allowed counterclaims (not those in dispute), $36,734.26. (Tr., p. 32.)

If this claimant was entitled to recover on these claims now in dispute, why this abandonment, and resurrection of the suit under this later act? Why, if standing alone and apart he had valid claims under the act of 1880, did he join the ranks of those whose only right was under the act of 1895? The object and effect of that act have been clearly determined by this court.

In District of Columbia *v.* Johnson (*supra*), Mr. Justice Peckham said:

> Prior to the passage of that act many of those contractors, in whose favor "board rates" had been allowed instead of the prices which were contained in the contracts executed by them, had brought suits against the District of

Columbia of a nature similar to the two suits now here, and had based their claims as to the balance due them with reference to the board rates allowed for work done under the contracts instead of the prices named in such contracts. Those claims had been held to be illegal, and the District of Columbia had successfully defended the actions and had succeeded in obtaining judgments allowing counterclaims in its favor for the difference between the prices as named in the contracts and those which had been paid by the board.

The Court of Claims had decided many cases to that effect, among which are those of *Roche* (18 C. Cls. R., 217), *Barnard* (20 C. Cls. R., 257), *Barnes* (22 C. Cls. R., 366), and *Eslin* (22 C. Cls. R., 160; 29 C. Cls. R., 370). This court had held the same proposition in *Barnard* v. *District of Columbia* (127 U. S., 409). The ground upon which the recovery on the counterclaim had been allowed was the illegality of altering the prices named in the contracts and of paying any greater sums for the work contracted to be done than was provided for in the written contracts, and payments beyond those sums were held to have been illegal.

Prior to the passage of the act of 1895, therefore, it is undisputed there was no claim, legal or equitable, which the parties could successfully maintain against the District of Columbia for the recovery of board rates for work done under written contracts with the municipal authorities, but such work could only be legally paid for at the prices named in the various contracts for such work.

These authorities would seem to have brought this case within the rule of *stare decisis*. But the appellees have endeavored to relieve themselves by contentions that after the execution of the contracts alterations and changes were made by verbal understandings and agreements with members of the Board of Public Works. These positions are utterly untenable. If the board could not alter the terms of the contracts by entries officially made on their record, members of the board could not alter them by amiable conversation and promises. The findings of the court nowhere find that these increases were new contracts.

As Judge Richardson pertinently said (*supra*), the grading of particular streets named was the work contracted for. The amount was not designated. In all the 342 contracts, which became the object of difference and examination, nowhere can be found any allusion to change of grades and diminution or enlargement of work in relation to that fact. The reference to dates, when certain work was done to bring streets to this or that grade, appears nowhere in the petition nor in the elaborate first trial of the case. The petition alleges work done under and connected with the contracts, and claims always, generally and in detail, for work done *under the written contracts*. We submit, in addition to the illegality of these increased rates, that the findings, if they were to be interpreted as declaring new contracts, would not be responsive to the allegations of the petition.

The new contracts would be *ultra vires*. Agents and officers of a municipal corporation can not bind

the corporation by any contract beyond the scope of its powers. The law of the district required that all contracts made by the board of public works should be in writing and signed by the parties. These words are mandatory. As said in *Clark* v. *United States* (95 U. S., 539), of a similar statute:

> It makes it unlawful for contracting officers to make contracts in any other way than by writing, signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law.

To further obviate the objections that the contentions of the appellee and the findings of the court are not responsive to the allegations of the petition and to the issue at the former trial of the case, it will be urged that there is in the record an amended petition which exactly parallels the findings. (Tr., p. 10.)

The answer to this is twofold. First, this paper was filed without notice, without leave of the court, and not until nearly two months after submission of the case. Second, it created entirely new causes of action, which could not be considered by the court by reason of the limitation in the statute.

If there is any fact evident upon the face of this statute it is the intention of Congress that the matters embraced in it should be speedily determined. The claimant (7 sec.) is required to prosecute his action

diligently. He is also required to present his petition within six months after the passage of the act. This was a statute of limitations. "The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded." (*The Harrisburg*, 119 U. S., 199, 214.)

The amended petition under which the case was tried (Tr., p. 3) states that claimant entered into contract No. 264, for the improvement of North Carolina avenue and D street, and contract No. 413, for the improvement of Second, Third, and Fourth streets, and then refers to the extensions. All the accounts are set up as done under these contracts and extensions. But this amended petition of March 11, 1902, simply filed in the clerk's office after submission of the case, endeavoring to meet and overcome the decision and adjudication of the court in the former case, sets up an entirely new case. By reference to the times at which grading was done, and allegations that the District had changed the grades of streets and required more excavation to be done, they now allege that there was an understanding and agreement that the additional board rates should be paid; and they also ask the court to reform the contracts.

Of this latter equitable relief there was nothing in the former petition. And as to the grading, the former petition puts its right of recovery on another and inconsistent ground, viz: "That, owing to the unforeseen

rise in the price of labor after said contracts Nos. 264 and 413 were first executed, the board of public works, by an order duly entered upon its official records, modified said contracts by changing the rates to be paid for extra haul from one half cent to 1¼ cents per yard per 100 feet; that such extra haul was fully worth the said increased price; and that in all partial settlements made by defendant's officers the justice, validity, and binding character of said modifications had been fully recognized, and payments made accordingly." (Tr., p. 7.)

The Court of Claims and this court have decided a claimant can not recover upon these causes of action. To recover for these identical amounts new causes of action were sought to be set up long after the time limited for bringing suit. This can not be done. This whole matter was exhaustively considered by Mr. Justice White, delivering the opinion of this court in *Union Pacific Railway* v. *Wyler* (158 U. S., 285), who said, *inter alia:*

> The general rule is that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is, that as the running of the statute is interrupted by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged, by way of amendment, which are part thereof.

But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies.

* * * * *

In Alabama the court said:

While a new cause of action may be introduced by amendment, the established limitation on the operation of its relation to the commencement of the suit is, that if the amendment introduces a new matter or a different cause of action not within the *lis pendens*, as to which the statute of limitations has operated a bar at the time of making the amendment, it is as available as if the amendment were a new and independent suit. (*Alabama G. S. R. Co.* v. *Smith*, 81 Ala., 229.)

Other applications of the doctrine may be found in the following cases: *Toby* v. *Allen* (3 Kan., 399); *Hiatt* v. *Auld* (11 Kans., 176); *North Chicago Rolling Mill Co.* v. *Monka* (107 Ill., 340); *Crofford* v. *Cothran* (2 Sneed, 492); *Flatley* v. *Memphis & C. R. Co.* (9 Heisk, 230); *Dudley* v. *Price* (10 B. Mon., 84); *Buntin* v. *Chicago, R. I. & P. R. Co.* (41 Fed. Rep., 744); *Atlantic & P. R. Co.* v. *Laird* (58 Fed. Rep., 760).

Nor do we think this question is in any way affected by the fact that the second amended petition was filed by consent. The consent covered the right to file it, but did not waive the defenses thereto when filed. If the interruption to the running of the statute created by the first summons applied only to the cause of action therein set out, it would have required an express renunciation of the benefit of the statute

which had fully operated upon the new cause of action set out in the amended petition when that petition was filed.

The *tenth* assignment of errors is directed to the construction of the act of 1880. If it was intended by the court below to hold that there was anything in that act to validate contracts illegal under the previous laws, we respectfully submit that was manifest error. The act of June 20, 1874 (18 Stat. L., 116), which provided for the establishment of a commission for the government of the District of Columbia, authorized it to exercise all the power and authority before lawfully vested in the governor or board of public works, "except as hereinafter limited," and "it shall be subject to all the restrictions and limitations now imposed by law on said governor or board." "But said commission, in the exercise of such power or authority, shall make no contract nor incur any obligation other than such contracts and obligations as may be necessary to the faithful administration of the valid laws enacted for the government of said District, to the execution of existing legal obligations and contracts, and to the protection or preservation of improvements existing or commenced and not completed at the time of the passage of this act."

We have already referred to the power of the governor and the board of public works in the matter of contracts.

The act of 1880 is a statute of jurisdiction. It created no rights; it established no contracts. When it extended the jurisdiction of the Court of Claims of claims against

the District of Columbia, it was of lawful claims. If the Board of Commissioners had made contracts for extravagant prices to be paid for expensive improvements, this act did not ratify their acts. The very specifications of the subjects of jurisdiction, "contracts made by the board of public works and extensions thereof made by the Commissioners of the District of Columbia," show the claims of the character embraced in this suit. And that language of distinction forbids their inclusion in the other mentioned classes in the act.

This construction has been entertained and acted upon in the previous adjudication of cases brought under the act, both in the Court of Claims and this court. It so remained as the law until the passage of the act of 1895 (supra). That act gave as a gratuity a large part of what is claimed in this suit at bar. And, although that act has been repealed, the claimant still insists he is entitled to what was given to him by it. This, in its last analysis, is the claim now urged upon this court.

I have had printed a certified copy of the docket entries in the case in the court below, for the use of the court, which I respectfully ask may be received as an appendix to this brief.

Respectfully submitted.

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